91-227

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

HAROLD KLAPPER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 31, 1991

QUESTIONS PRESENTED

1. Does the decision of the Second Circuit requiring profits for a serious novelist during the start up period of his career in order to claim tax deductions as a writer conflict with the Circuit decisions; and, does reliance upon Internal Revenue Service regulation, 26 C.F.R. § 1.183-2(a)(b), allow said regulation to overrule Circuit law, especially since applying said regulation to a novelist has not yet been decided by this Court?

2. Does the failure of the Second Circuit to apply the Helvering standard to strike IRS's Deficiency Notices as arbitrary and capricious conflict with the Circuit's decisions and depart so far from the usual and accepted course so as to call for this Court's supervision, including for the extraordinary failure of the Second Circuit to apply the plenary and clearly erroneous standards of review to the lower court?

3. Does the failure of the Second Circuit to

reverse because of the United States Tax Court's total failure to apply tax court procedure depart so far from the usual and accepted course so as to call for this Court's supervision, especially since it allows this Court the opportunity to reaffirm the role of procedure in the Tax Court during this period of American economic life?

4. Does the failure of the Second Circuit to reverse the Tax Court for extreme constitutional abuse warrant review by this Court?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Harold Klapper and the respondent Commissioner of Internal Revenue.

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The petitioner Harold Klapper respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above entitled proceeding on May 22, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is not published by order of said Court, and is reprinted in the appendix hereto, aa 1, *infra*.[1]

The memorandum opinion of the United States

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[1]References to the record in the Second Circuit are from the Joint Appendix ("1") with Addendum ("A-1).

Tax Court is reported at 60 T.C. Mem 182 (CCH) (1990), and is reprinted in the appendix hereto, aa 6, *infra*.

The interim order of the United States Tax Court is not reported, and is reprinted in the appendix hereto, aa 14, *infra*.

The pre-trial order of the United States Tax Court is not reported, and is reprinted in the appendix hereto, aa 15, *infra*.

JURISDICTION

Invoking federal jurisdiction under Internal Revenue Code § 7443, the petitioner brought suit in the Tax Court challenging IRS Notices of Deficiency.

On petitioner's appeal, the Second Circuit affirmed.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under

The jurisdiction of this Court to review the judgment of the Second Circuit is 28 U.S.C. § 1254(1).

STATUTE INVOLVED

26 C.F.R. § 1.183-2(a)&(b), is reprinted in the appendix hereto, aa 16, *infra*.

STATEMENT OF THE CASE

Introduction

Petitioner, a practicing lawyer, also an aspiring novelist, brought this action against Internal Revenue Service, ("IRS"),in the United States Tax Court, following five notices of deficiency for 1979, 81, 82, 83 and 84. The Notices denied petitioner any deductions or expenses solely because IRS refused to proceed with its own agreed to agency proceedings following petitioner's cooperative audit for 79, out of fear that its guidelines, 26 C.F.R. § 1.83-2(b), were overruled by federal court law or, if reasonably applied, required the profit test of the guidelines to be applied to an aspiring writer in a reasonable way.

Following petitioner's 79 audit, the examiner stated:

> "The service is convinced that you <u>are</u> a serious writer. However our guidelines do not allow you to take deductions because

you produced no income." (34).[2]

* * *

"Your complete records of writing for the 1979 and other audit years in question are without a doubt proof of your efforts". (34).[3]

There followed, not the agreed to interim IRS appeal sought by IRS and confirmed in writing, (33-36, 77-85), but a series of IRS harassments - stretched over years - threatening petitioner to abandon the interim appeal, (to test internally with IRS how § 1.83-2(b) should apply in view of the federal case law and petitioner's proof of serious writing), involving repeated phone calls, (37-39):

"Come on Harold. You know you're not a writer. You know you're just a Jewish-American lawyer." (37).[4]

References to the record are the joint appendix, before the Second Circuit, i.e., ("1"), with addendum, i.e., ("A-1").

[3]At the Tax Court trial, IRS conceded the accuracy of these quotations, (187-88).

[4]At a hearing prior to trial at the Tax Court, IRS counsel when confronted with this pattern of abuse, denied none of it, claiming inability to find the IRS personnel, expressly identified, that carried on the harassments, "I could not locate her". "I couldn't locate either

In the Tax Court Before Trial

Following commencement of the Tax Court action, to avoid its history of abuse, IRS engulfed petitioner with voluminous document and interrogatory demands, (11-18, 20-30).

Consequently, petitioner objected to IRS's discovery, Tax Court Rules, ("T.C.R.") 71(c); moved for summary judgment under 70(a)(2), to dismiss IRS's case under 53; and, for production of documents under 72. Petitioner set forth the full the facts and documents and fully briefed the decisional law under the United States Constitution, showing IRS's whole case to be arbitrary and capricious, violative of due process. and subject to estoppel, (32-139).

A hearing was set before the Tax Court. IRS failed to oppose petitioner's motion for

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of them." "Q Are they still at IRS?" "A I don't know."(188-89, 191-94. (See also 193-94 claiming inability to locate Ms. Goldberg who with her superiors arranged the interim appeal process after a full agency 79 audit).

summary judgment, and brought no witnesses or documents, (151-222). IRS counsel conceded that if IRS had given petitioner any fair procedures:

> "Q Ms. Klapper,[5] did I not tell you in several conversations; I will give you every document I have, provided you honor the agreement, and until you do that --
> "A Yes, you did." (179-80, 182-85).

At the hearing, the Tax Court Judge who had strenuously opposed petitioner's omnibus motion, and only reversed its prior order granting IRS's motions for discovery in the face of petitioner's affidavit of almost one hundred pages documenting the abuse of IRS and the failure of the tax court to give due process, (223-31); denied petitioner's due process charges but refused to allow the affidavit so proving into evidence or testimony by petitioner so proving, (155-74, 200).

The Tax Court judge, despite the prime

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[5] One of IRS's attorneys and no relation to petitioner.

purpose of the hearing to determine the due process and Tax Court rules abuses of IRS; and, IRS again admitting it has "an oral agreement" with petitioner to proceed in the matter, (163, 189-91, 179-99), cut of all questioning of IRS into the very issues delineated, including the location and production of the IRS examiner for 79 who had sought the interim appeal and had said of petitioner, "[Ms. Goldberg] Most do not cooperate as you have", (33) (177, 183-86, 192-97, 197-99).

At the hearing, December 5, 1988, cursorily without explanation or proof denied all of petitioner's motion in one phrase: "Your motion was denied", (220); and despite the uncontested showing of bias by the Tax Court judge, the judge refused to recuse himself, "Your motion is denied", (221). The judge set trial for December 16, 1988, (a Friday), with all documents to be exchanged by December 12th,

(Monday), (220-21).[6]

Immediately after, petitioner worked day and night to get all his thousands of documents together, the result of which, following four full days document production with IRS, (237-38), IRS:

> "agreed to all of the financial figures -- every document of dollars, not matter what category." (239).
>
> * * *
>
> "Q Mr. Faulkner, did you and I meet over three days to discuss figures?
>
> "A Yes.
>
> "Q Did you and I discuss and reach an understanding that you would make recommendations, and if they approved it....[D]id you not tell me, Mr. Faulkner, that would go to respondent, once we had reached an understanding between us, and get authority, if you could which would bind both parties in the stipulation?
>
> A Yes."(265-66).[7]

Further:

> "Q Mr. Faulkner, over the three days we met, did you not look through substantial, or some portion of my claimed Schedule C

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[6]As called for by T.C.R. 91.

[7]Testimony of IRS auditor at trial. Schedule C is the relevant IRS 1040 form of expenses, most relevant to the case at bar.

expenses?

"A Yes.

"Q Did you not accept them as figures without prejudice as to the legal issue whether they were deductible.

"A Yes.

"Q Did not we have an understanding I wouldn't have to prove these figures in Court?

A Yes." (267).

IRS at the four day document production further accepted all proof of petitioner's writing as a novelist, (again without prejudice to the legal issue of hobby/ business start up expenses):

"THE WITNESS [Petitioner]: Over the four days... exchanging documents with respondent ... the history of my Schedule C activities.

"I produced over four days, testimony as to the following evidence -- that in 1979, 1981, 1983, and 1985, and 1982, I wrote novels repeatedly and in various drafts, working in my apartment; that apartment is a two and a half room apartment,

"Mr. Holland [IRS auditor] accepted the fact that, based upon my diaries and my manuscripts and my letters of submission, and my answering his questions, the fact that, and I testify to it today, that over those five year periods, I wrote

novels...from two to three and a half hours a night, five to seven nights a week, usually fifty weeks a year."(288-89).

Exhibit 4 in evidence at trial, (part of petitioner's literary writing correspondence produced before trial at the document exchange), (485--529), was overwhelming fact proof of petitioner's serious writing career. During the tax years in issue, one of petitioner's novel manuscripts was accepted by Paul Gitlin, Harold Robbins's literary agent, (322-23, 554); another accepted by the agent Barbara Bova, who submitted it following extensive rewriting at her request to top editors at leading publishers, (487-89, 501), 506, 516, A 84). [8]

Petitioner's manuscripts over the years as written and rewritten and involving many different and separate works of full length

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[8]Including Doubleday (501), Simon & Schuster (488), Random House (487), and Crown (489).

fiction, were also considered by the Bill Berger Agency, representing Lawrence Saunders author of First Deadly Sin, (498, A 3); Harold Ober agency, representing the estate of F. Scott Fitzgerald, (495, A 3); and, Jean Naggar, an agent who had previously represented petitioner and was then at the submission time representing the author of Clan of the Cave Bears, (A 5-9); and, the leading agent/attorney Morton L. Janklow, (495).[9]

Thus IRS had during the four days of document production by petitioner, overwhelming proof of his ongoing serious writing during the audit years; and, overwhelming proof of the serious acceptance of his manuscripts by the professionals of publishing:

Thus, Naggar: "Strange mixture of riveting

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[9]Naggar found petitioner's novel manuscript "extraordinarily good" in "many pages", (A 9). However, petitioner was forced to withdraw submission from naggar since, in the meantime, another agent -Bova - agreed to represent him, (A 85). Writers do not ethically have more than one agent at a time representing them. (A 85, 87).

and disappointing moments" (486); Arbor House: "THE SEARCH FOR THE EVIDENCE is a good effort" (491); Russell & Volkening: "JAWS OF DARKNESS. There wa a lot in it I liked" (494); Rodell-Collin: "A SEARCH FOR THE EVIDENCE...improved as the work is" (496); Mary Yost: "excellently written in the first few chapters" (503); Gayle Benderoff & Deborah Geltman: "Thank you for resubmitting...A SEARCH FOR THE EVIDENCE ....You've obviously revised extensively and worked very hard at it" (508); Rodell-Collin: "SUCH A DAMNED GOOD TIME...there is a lot in it I admire" (515); Bova: "A DAMNED GOOD TIME...is a fascinating book in many ways" (516); Collins Associates: "SUCH A DAMNED GOOD TIME...WAS QUITE INTERESTING" (521); Russell & Volkening: "SUCH A DAMN GOOD TIME...there is interesting material in it" (522); Charlotte Sheedy: "SUCH A DAMNED GOOD TIME...the sections dealing with the legal material is interesting to the

reader" (524).[10]

An agreement was made to stipulate between IRS and petitioner as required by both T.C.R. 91 and the Tax Court judge's own pre-trial order in the case at bar, (8-10; aa 15).

Petitioner went home on December 15, 1988, (following the four days document production on December 12th, 13th, 14th and 15th), and drafted late into the night the agreed stipulation of fact/documents using the very financial figures IRS's second auditor had finally added up and set forth in writing as agreed to by the parties. (238-62, 262-73, 282, 414-19, 424-26, 429-30, 454-80, 481-84).

Eight o'clock the morning of the 16th, petitioner telephoned said auditor at IRS and read the final stipulation. Petitioner was reassured the stipulation was still agreed to

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[10]An editor at Doubleday, (letter April 25, 1979), asked petitioner to rewrite a novel submission; making a many page editorial check list of changes Petitioner did exactly that, (509-10, A 82).

by respondent, (i.e. IRS's attorneys). (238-62, 262-73, 280, 282, 414-19, 424-26, 429-30, 454-80, 481-84).

The stipulation was drafted in exact compliance with IRS's authorization, (481-84), and contained in IRS's auditor's own handwriting, the final figures of all categories of Schedule C and other deductions, exclusions, etc, (480).

The Trial in the Tax Court

Working in obvious conspiratorial tandem,[11] IRS and the judge of the Tax Court, refused to accept the stipulation at the trial's opening.

Thus:

"THE COURT: You do not have an agreement with Ms. Klapper at this time.

"MR. KLAPPER: May I tell you why, respectfully? The way it worked was - -

"THE COURT: Wait a second. Ms. Klapper, do you have an agreement with Mr. Klapper?

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[11]IRS before the Second Circuit did not deny petitioner's citations to the trial record, (326-29, 330-31. 394), that IRS had been in regular ex parte communication with the Tax Court Judge during the time period of the document production and up to the start of the trial, (9:00 A.M., December 16, 1988).

you have an agreement with Mr. Klapper?

"MS. HANNAH KLAPPER: No, I do not. An agent of our's - -

"THE COURT: Unless she says yes, you do not have an agreement.

"MR. KLAPPER: May I at least have the facts, and I'll make it very quick? I'll do it very quickly.

* * *

"But there was an agreement, and the only thing which would make it not exist is if I made a mistake....

"THE COURT: Ms. Klapper says there's no agreement.

"MR. KLAPPER: But if there was an agreement, in fact. Mr. Faulkner --

"THE COURT: Ms. Klapper says there is no agreement." (245-47; emphasis supplied)

* * *

"MR. KLAPPER: We had an understanding last night.

"THE COURT: She says you do not have an understanding. The Court is accepting that.

"MR. KLAPPER: But can't I make my proof, why there was an understanding?

"THE COURT: You can state what your understanding is, if you wish.

"MR. KLAPPER: But can't I produce the best evidence, which is the witness who negotiated for them as their agent, and who said he was acting with authority.

"THE COURT: She already has said that he had no authority to make an agreement.

"MR. KLAPPER: But that's her word against the evidence. That's just a conclusion.

"THE COURT: The Court is accepting those words and saying on the basis of that, there is not settlement. That's the end of it, Mr. Klapper." (253-54; emphasis supplied).

As petitioner persisted as the trial progressed, Mr. Faulkner was recalled:

"A I said you would have to bring in your stipulation and we would review it before trial and determine whether we agree or disagree,

"Q As to whether or not my expenses would be agreed to, in lieu of production; correct?

"A As to what you wrote in the stipulation was what the parties agreed to.

"Q What had the parties agreed to as Schedule C expenses.

"MS. KLAPPER: Your Honor, this is settlement negotiations which is inadmissable as evidence.

"THE COURT: Sustained." (emphasis supplied) (415-19).

Every time petitioner was able to get into evidence the truth, the testimony shows IRS had

agreed to stipulate:

"MR. KLAPPER: Now on Schedule C, it was our understanding, and again, that the issue before this Court to the extent the Government would claim it, was whether or not they were justified under expenditures of a profession -- a writer, an attorney or photographer." (256; emphasis supplied).

* * *

" Q Mr. Faulkner, over the three days that we met, did you not look through substantial, or some portions of my claimed C expenses?

"A Yes.

"Q Did you not accept them as figures without prejudice as to the legal issue whether they were deductible?

"A Yes.

"Q Did not we have an understanding I wouldn't have to prove these figures in Court?

"A Yes.

"Q What figures are they?

"A We had numerous documents...." (267; emphasis supplied).

Throughout the trial, the judge and IRS continued to block the truth of the agreed to stipulation, in similar vein, 420-28, 284-303).

Next, the Tax Court Judge - having erroneous-

ly and upon the literal morning of the opening of trial - told petitioner he would now to both prove and xerox all the thousands of documents that had already been produced for IRS during the four day document exchange and agreed to by them for the express purpose of a stipulation.

The record shows the obvious IRS's attorneys' contrivance with the Tax Court judge - a conspiracy to make petitioner do the physically impossible - produce in the courtroom and xerox at that very moment thousands of pages of documents petitioner believed, (as he had every right to believe), were unnecessary to xerox because they had been agreed to, (the stipulation to be signed the morning of the trial opening), as called for under the Tax Court Rules and the Tax Court judge's own rules.

Thus:

"MR. KLAPPER: In other words, you're not going to let me prove my finances for --

"THE COURT: We're here to prove your finances.

"MR. KLAPPER: How can I prove it without the documents?

"THE COURT: That's your problem.

"MR. KLAPPER: But I'm only a half an hour away. All I have to do is get into a cab and go home and get them.

MS. DETTERY [the senior IRS attorney]: Your Honor, Respondent has seen Mr. Klapper's documents that he presented .... It's Respondent's contention that nothing would be served by allowing him to bring in these papers at this time, and granting him a continuance to do so." (275; emphasis supplied).

* * *

"THE COURT: On Monday, you gave them all the receipts?

"MR. KLAPPER: Monday, Tuesday, Wednesday and Thursday. They went through everything....Your Honor, respectfully, it would be a travesty -- if your Honor is called to the phone for a half an hour, we'd take -- I'm saying to you, on four days, I had all my --

"THE COURT: You've done nothing during the course of this trial, but delay the trial, Mr. Klapper, and you're asking for another delay." (276-77; emphasis supplied).

* * *

"MR. KLAPPER: How am I going to prove what receipts....if they are not physically in front of me. Most of them are highly organized....They're organized in many years for my France experience - - they're all in packages....

"THE COURT: I'll give you 30 minutes...." (277-78; emphasis supplied).

* * *

"THE COURT: Let the record reflect that Mr. Klapper is not here; that we recessed around 10:15 a.m....It is now 11.25 a.m. and we have not heard from Mr. Klapper....Is Mr. Klapper here? Mr. Klapper I was just stating on the record that we gave you 30 minutes, and it is no[w] an hour and ten minutes, and we had not heard from you, and I was going to entertain a motion to dismiss for lack of prosecution.

"MR. KLAPPER: Well, Your Honor....I have appeared with four heavy suitcases going in heavy New York traffic; having to take a taxi back. It was easy to get uptown, because I had to carry two suitcases. Coming down with four, I had to take a taxi to move as quickly as I did; to have put hundreds of documents in these four suitcases, and to have gotten here in an hour and five minutes, is most quick. I take strong exception to your having said that you would have moved to dismiss. It's clear that I was, in good faith, in compliance with my time recommendation.

"I wish to state for the record, at 8:10 this morning, at Mr. Faulkner's request, I telephoned him at his office on his own number, and I said two things: I have redrafted the stipulation of facts. Is the Government still honoring its agreement as to Schedule C, that I do not have to produce figures; it's only an issue of law? He said, yes, and he said, Ms. Klapper was standing right there. So, my pressure in time --

"THE COURT: Are you ready to go forward now, Mr. Klapper?

"MR. KLAPPER: I am.

"THE COURT: Let's go forward with this trial." (279-80; emphasis supplied).[12] [13]

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[12]Thus the thousands of documents agreed to were necessarily kept out of the trial by the obvious intent of the Court. Still, see facts supra, petitioner made his proof.

[13]The Tax Court judge found in response to the following testimony of petitioner:

"[W]orked day and night and started calling the government on Wednesday [Dec 7th]. All day Wednesday, Ms. Klapper; all day Thursday, no answer. Friday morning, I got no answer.

"I tried Ms. Dettery. Her phone clicked out. I found one line that got me to the reception. The receptionist...got Ms. Dettery. Ms. Klapper was out sick. There was no one to meet with me. I offered to work over the weekend. Instead, they said, we'll start on Monday. " On Monday morning, I got a call from Ms. Klapper....Ms. Dettery and I agreed...we'd keep working through the night and into Tuesday.

"On Monday morning, at --

"THE COURT: The only order I entered was that you would exchange documents by Monday.

"MR. KLAPPER: Well, all right. If the exchange couldn't take place by Monday, physically, we'd keep working until it got done.

"THE COURT: Well, that was not part of my order. My order was that they would be exchanged by Monday.

"MR. KLAPPER: All right, in any event, notwithstanding, because the time had been lost, on Monday, I came down and I started exchanging

The remainder of the trial was a litany to the judge and IRS's abuses in obstructing the evidence. The single most due process obstruction along with the xeroxing requirement, (see infra), is the Tax Court judge - once petitioner achieved the impossible - rushing from home with his proof under the above stated incredible pressured conditions - attempting to keep said evidence out of the record to protect its conspiracy with IRS). Thus:

> "THE COURT: This is the most disorganized I have ever seen....It is a -- just -- it is a bag entitled "Carry With ease and Comfort." It is a plastic bag. It looks like a grocery shopping bag....[14]
>
> "THE WITNESS: May I comment on that, Your Honor? May I comment on that, Your Honor?....
>
> "THE COURT: Yes, you may.
>
> "THE WITNESS: To begin with, this is not a bag with loose paper. They are financial statements. I start reaching out. Here, an

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documents. We worked for four days. I was available
...." (237-38).

[14] What difference does that make?

envelope which I pulled from the bag, France, 1983. One neat envelope with receipts. This isn't loose paper. I go on....

"THE COURT: I'm calling this to a halt, Mr. Klapper." (400; emphasis supplied).

* * *

"THE WITNESS: Two more bags, I'm handing up.

"THE COURT: Hand them up.

"THE WITNESS: Here are individual manilla envelopes with documents inside by category. There are one, two, three, four of them. hand it up?

"THE COURT: Hand them up.

"THE WITNESS: Here is a red accordion folder with one, two, three, four, five, six, seven, eight manilla envelopes containing documents inside by category for 1979.

"Here are three more bags. The bags are simply large plastic bags containing inside, separated, organized documents for the audit years in question, which completes all the years in question for schedule C, which were all submitted to respondent over four days this week and were accepted by respondent as of 8:00 this morning, finally.

"THE COURT: They do not appear to be organized -- to the Court.

"THE WITNESS: Well, how do you know they're not organized. Are you looking through the bag, Your Honor.

"THE COURT: Pass it up; let's look at it.

"THE WITNESS: Will you please take it out of the bag?

"THE COURT: Pass it up and I'll look at it.

"THE WITNESS: May, I ask you, can you see through the bag?

"THE COURT: Pass it up. I'll see what's in the bag. Which bag do you claim is organized? All three of those?

"THE WITNESS: Basically all of the bags -- as I said in the beginning, almost all of the documentation is organized. may be 10 percent isn't." (406-7; emphasis supplied).* * *

"THE COURT: I just pulled out of the yellow bag that was marked B-E-R-C-E-S-I Hardware.

"THE WITNESS: That's just a bag I used to carry them in. It has nothing to do with what's inside. What you left in the bag are a series of bank statements in individual wrappers and a rubber band." (408; emphasis supplied).

"THE WITNESS: I note for the record that respondent looked at these documents over four days, and respondent's Mr. Faulkner was the person who was able to reach conclusions, but which were denied for the simple reason Your Honor said -- in my opinion, incorrectly -- there was no final agreement." (409).

"THE COURT: No, I want the record to be clear that they are disheveled and disorganized, and that is why the Court is not accepting them, in addition to the

fact they are not copied....

"THE WITNESS: <u>These 24 bank statements were disheveled?</u>....

"THE COURT: <u>I'm not going to argue with you anymore, Mr. Klapper</u>. (410; emphasis supplied).[15]

Further, petitioner was never allowed to call IRS's Mr. Faulkner, (the key IRS auditor who spent three days of the four going over petitioner's thousands of pages of documents, and who both drafted the final figures in his

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[15]The documents could not have been disheveled. They were part of the larger group of documents that IRS had obtained and approved over four days of scrutiny, leading to IRS agreeing to figures: regardless of whether said stipulation was binding, (480-84). IRS would <u>never</u> have spent four days with petitioner utilizing two auditors if the documents were disheveled.

Moreover, IRS's attorneys at trial did stipulate to many categories of information that came from the very same documents, (247-57). Thus: "MS. HANNAH KLAPPER: Your Honor, I would be willing to read into the record, the figures that Mr. Faulkner arrived at...employee business expenses, interest, sales taxes and medicine." (247).

This could not have been done if the documents were disheveled as the judge misrepresented; the misrepresentation, of course, being for the sole purpose of contriving an excuse to keep petitioner's evidence out of evidence.

own handwriting for the stipulation, plus at 8:00 A.M. the morning of trial with IRS's attorney at his side, spoke with petitioner confirming that the agreed to stipulation was still good), as a witness, because said testimony would be "hearsay", and was "not relevant", although as set forth supra, IRS called Mr. Faulkner at every desperate time in an attempt to keep the document stipulation out of the record as agreed to, (338-42). [16]

The Tax Court judge coached Faulkner while he testified for the sole purpose of making a false record on the law and facts of the agreement to stipulate, (264--65), then cut off Q and A of Faulkner by petitioner to prevent the truth from being testified to, (266, 267, 270-71, 272, 367-375, 412, 413, 415-17, 417-18, 419).

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[16]The judge allowed IRS counsel to "testify" as to Mr. Faulkner's conversations with petitioner when he wasn't in the courtroom; then when confronted with this unfairness, then found Mr. Faulkner's testimony "relevant" and recalled him as a witness, (355-58).

The judge, intentionally or not, confused the privilege of settlement with the Tax Court Rule on stipulations which necessarily mandates all proof as to what the parties did or did not stipulate to without any privilege, (272-73).

The Judge during the trial bullied petitioner to prevent him from proving his case, (302-04); then coached IRS's attorneys to object to evidence that obviously belonged in evidence and which was highly relevant, (309-10). He insisting on motions arising at trial to have been waived because not made by petitioner before trial; a total impossible:

"THE WITNESS: How could I have done it prior to this trial, when I only finished the stipulation of facts last night, and didn't know until this morning that they were not going to agree to what they agreed to.

"THE COURT: I am ruling that it is too late, Mr. Klapper.

"THE WITNESS: In other words, if I had made this motion at the opening of the trial, you would have entertained it?

"THE COURT: I did not say that.

"THE WITNESS: Well, when would you have entertained it?

"THE COURT: I don't know, but I am not entertaining it now." (311-12);

Then the Court kept out the full manuscripts of novels although IRS had itself xeroxed them prior to trial, (315-16).

The judge literally halved the trial time in obvious ex parte communication with appellee, while petitioner was in the middle of his case proof, (326-29, 330--31, 394); He sneered at petitioner, (333-34); threatening him with contempt, (339-41, 343).

Then as the trial ended, (truncated so petitioner was still further stymied in making his proof), the judge threatened petitioner's license to practice law in every state where he is licensed:

"THE COURT: Mr. Klapper, are you an attorney?

"THE WITNESS: I am.

"THE COURT: Are you licensed to practice in this state?

"THE WITNESS: I am.

"THE COURT: Are you licensed anywhere else?

"THE WITNESS: I am.

"THE COURT: Where else are you licensed to practice?

"THE WITNESS: Florida and the District of Columbia.

"THE COURT: What other?

"THE WITNESS: What other states?

"THE WITNESS: None -- those three.

"THE COURT: Florida, the District of Columbia and New York?

"THE WITNESS: That's correct.

"THE COURT: Do you regularly practice as an attorney?

"THE WITNESS: I do.

"THE COURT: Do you represent people in those courts in Florida --

"THE WITNESS: Mainly New York.

"THE COURT: New York --

"THE WITNESS: New York.

"THE COURT: -- and the District of Columbia?

"THE WITNESS: New York.

"THE COURT: Mainly New York?

"THE WITNESS: New York exclusively.

"THE COURT: Very well. You're actively practicing now as an attorney?

"THE WITNESS: That's correct.

"THE COURT: Very well.

"THE WITNESS: May I ask you what the relevance of that inquiry was?

"THE COURT: The Court wanted to know.

"THE WITNESS: Why?

"THE COURT: Because the Court wanted to know.

"THE WITNESS: Doesn't the Court feel an obligation to tell me why? (431-32).[17]

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[17] During a break at the trial as petitioner was deliberating whether to try again to break the obstruction of due process by the Judge, the following took place:

"[T]he young lady who sat with Judge Wells and marked documents; during the break when I went outside to make a telephone call regarding the decision of J Wells to give me over the weekend to [sic] xerox the Schedule C, exhibit 16 documents; that young lady came out to the phone booth outside the courtroom where I was talking on the phone, and said, the judge is about to take a default, you'd better get your ass in there." (A 2; emphasis supplied).

And:

" At the end of the trial, when troubled about the logistics of getting back exh 16, the courtroom was empty save for the young lady and the court reporter who had transcribed. She kept me waiting, then said, well the fucks are all gone - - oops

The pattern of IRS due process abuses continued throughout (1) before the Tax Court action commenced, (32-139); (2) after the Tax Court action was commenced through the Tax Court hearing on petitioner's motions based in large part on due process and other constitutional abuses (151-222); (3) the trial (232-445); and, (4) into the Second Circuit appeal.

Regarding the repeated abuses leading up to the deficiency notices:

"Q Did you speak with Ms. Goldberg?[18]

"A [IRS attorney] No, I did not.

"Q Did you try?

"A Yes, I did.

"Q What was the result of that?
" A I could not locate her...." (193-94).

Klapper, didn't see you. (A 2-3; emphasis supplied).

[18]The IRS examiner who with agency approval set up the interim appeal, (33-36, 77-85), then thwarted by IRS, who then threatened petitioner repeatedly over years before issuing its deficiency notices as though petitioner had filed no tax returns, (37-39, 81, 87-90).

Indeed, IRS - through its attorneys - insisted on charging petitioner with late filing penalties although IRS had in its files, and knew it, bona fide extensions. Why?

> "I also had an understanding with Respondent that penalties for late filing in '81 and '82 would be removed, because in respondent's own files were the notices of extensions. Mr. Faulkner said he would speak to Ms. Klapper and they were right there.
>
> * * *
>
> "MS. HANNAH KLAPPER: Your Honor, had petitioner sat down with us and cooperated in looking at our stipulation of facts, I would have gladly deleted that from the stipulation -- that he was late. We agree that there was an extension [for '81 and '82]."(281; emphasis supplied)[19]

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[19]In other words, if petitioner had signed IRS's stipulation rather than the true one agreed to by Faulkner for IRS and its attorneys, (thereby conceding the case), IRS would have obeyed the law.

IRS's stipulation was an attempt to do before trial what IRS did at trial, defeat the proven evidence, (613-19). Thus:

> "On December 15, 1988, late in the day, as we were discussing the Fact Stipulation, Ms. Klapper, in an open hallway-desk area began moaning: "I want you to sign our stipulation." As I reminded her of the whole point of the four day audit and that Faulkner and I had agreed all along

In the Second Circuit, to avoid confronting the 600 plus page joint appendix, IRS cited in its opposing Brief to the official Docket solely. Its brief accused petitioner of taking more than $82,000 deductions as a writer - a total falsehood - its own "Amount of Deficiency Disputed" for all five years was $30,000 less, (4-5). Indeed, the very tax records introduced by IRS showed exactly how much petitioner had

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and with her as she regularly pocked her head in, Ms. Klapper began moaning in a sobbing voice -- call the marshall, he's threatening me - - over and over. Faulkner was there all the while listening and watching. I believe secretarial help was there at unrelated desks. A group gathered and just watched. Finally, Ms. Klapper stopped.

"Well, I asked sharply, do I go home and draft (meaning the agreed version)? Yes, she yelled and ran out. Looking questioning as Faulkner, he said, don't worry; then smiled at me reassuringly. At that point he gave me a direct telephone number at IRS so I could call him 8:00 the morning of the 16th - the trial was ordered to begin 9:30 -. I believe, (not positive), it was then he gave me the last page of my notes with his figures showing what I was to put in. It signified the "OK" I had been circling with his approval was now final." (A 1-2).

spent on travel and entertainment in all his work, including lawyering and seeking work as an attorney:

> 1979 "[line 29] Travel and entertainment.....3,400";
> 1981 "[line 27] Travel and entertainment.....3,110";
> 1982 "[line 26] Travel and entertainment.....4,510";
> 1983 "[line 26] Travel and entertainment.....3,810";
> 1985 "[line 27] Travel and entertainment.....2,810"
> (A 24, 37, 54, 66, 75).

This total figure of $21,541 for five years includes an uncontested lawyer business trip to Holland, (337), plus "intensive journals of all my years in France, during the years of audit .... all the figures were gone into with Mr. Faulkner....These logs and journals show daily entries...." (337)

IRS's Second Circuit brief falsely accused:

> "[H]e further stated that he had traveled extensively throughout France, taking pictures and sampling the offerings of luxury hotels and choice vineyards...." (emphasis supplied).
>
> * * *
>
> "It is clear from the record that taxpayer greatly enjoyed the personal and recreational aspects of traveling through

France from one luxurious hotel to the next and sampling the offerings of choice vineyards,"emphasis supplied).

The record shows no such proof; rather petitioner traveling frugally in France, working as a writer all the time (see appendix before Second Circuit inter alia).

IRS lied in its brief to he Second Circuit claiming all petitioner's novels "were rejected by the agents and publishers to whom they were submitted", (see supra). Equally, IRS lied to the Second Circuit claiming petitioner "did not seek the help of outside advisors... devoted minimal time and effort to his writing activities." (see supra).

Indeed, the exhibits admitted at trial show leading agents reviewing petitioner novels after revisions and on subsequent agreed to submissions, (485, 486, 496, 498, 500, 508, 513, 515,-516, 517, 522, 524, 525, 526; A 86,

88).[20]

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit's decision requiring profits for a fledgling writer conflicts with decisions of other Circuits and probably its own. Its application of IRS regulations so requiring is in conflict with federal circuit law, an important matter for this Court to resolve as an issue of first impression

In its opinion affirming, the Second Circuit agreed with the Tax Court that petitioner's writing activity was not engaged in for profit, referring to Treasury regulation 1.183-2(b). (aa 16-17). No citation to the record was made.

The clear record facts are that as an aspiring writer who had established beyond peradventure his seriousness in effort and reception by the publishing world, the absence

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[20]IRS cited to no appendix or docket proof for any of this; instead relied upon the brief of IRS in the Tax Court which made the same assertions without any proof or citation to the record, (A 79-81). There is no such proof in the record or the thousands of pages of documents provided IRS before trial and accepted by IRS.

of profit by petitioner is both not required under law; and, to so require it dampens the start up business world of the serious aspiring writer. That is why the decisions in the Circuits uniformly are contra to the instant decision of the Second Circuit and are important to affirm.

See especially, Snyder v. United States, 674 F.2d 1359 (10th Cir. 1982). There the taxpayer also was a practicing attorney working on a book of photographs of Colorado. Like petitioner he submitted to publishers who expressed interest, but none offered to publish. Still, deductions were claimed for the writing expenses. The district court found for IRS, (at 1362-63).

In reversing, the Circuit Court held:

> "The IRS argued below and in this court that an author cannot be in the trade or business of writing if he has not yet produced a book, and it appears from the trial judge's comments during trial that he may have accepted this assertion. If so, the trial judge made his decision based on an erroneous legal conclusion. We find no support for this contention and believe, as a policy matter, that such a

position would have an unwarranted and undesirable chilling effect on budding authors who are serious in pursuing a writing career.

* * *

"The profit motive of the taxpayer is 'only significant [under 162]...as it affords ...distinguishing between an enterprise carried on in good faith as a 'trade or business' and...carried on as a hobby'.... A taxpayer is clearly not engaged in a trade or business if his predominant purpose is recreation or a hobby. [citation omitted] On the other hand, an author may be in a trade or business within the meaning of section 162 if he 'participates in that endeavor with a good faith expectation of making a profit.' [citation omitted]" (at 1363) (emphasis supplied).

The facts supra make abundantly clear that Snyder applies to petitioner. The leading agents and publishers of New York that considered petitioner's repeated rewritten novel after novel manuscript submissions, were most certainly interested in a profit and would not have considered petitioner - indeed several represented him after reading the submissions - had he not been serious in effort and manifested ability. The second Circuit is clearly in error and conflicts with both the

other Circuit decisions and the important policy considerations they represent.[21]

All other relevant Circuit law is in accord with Snyder; not the Second Circuit. See, Gajewski v. C.I.R., 723 F2d. 1082, 1065-67 (10th Cir. 1982), discussing profit; Eastman v. U.S., 635 F. 2d 833, 837-38 (Ct. Claims 1980), discussing profit; Drier v. C.I.R., 665 F.2d 1292, 1294, (D.C. Cir. 1981), discussing profit: "One may embark upon a venture for the sincere purpose of...profit, but in the belief that the probability of financial success is small or even remote."(at 1299); Nickerson v. C.I.R., 700 F.2d 402 (7th Cir. 1983), discussing profit; Malmstedt v. C.I.R., 578 F.2d 520, 527 (4th Cir. 1978): "It matters not

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[21]Hemingway, Joyce, Faulkner, to name a few, would not have been writers entitled to a non hobby deduction according to the Second Circuit during the early, start up periods of their writing where no profit, rather heartbreaking rejections, were the rule. Whether one fails as petitioner or goes on as the former did, to discourage all that are serious is in the words of Snyder "unwarranted and undesirable chilling effect on budding authors".

that its efforts were unsuccessful. Success is not the test of deductions as a business expense. The test is whether the business was undertaken in 'good faith for the purpose of making a profit' [citations omitted]"; and, Steffins v. C.I.R., 707 F.2d 478, 482 (11th Cir. 1983), [22]

In relying on 26 C.F.R. § 1.183-2(b), the Treasury Regulation, 1. 183-2(b), the Second Circuit -alone petitioner believes in the world of jurisprudence - applied it to a writer; again in conflict with Snyder et al.[23]

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[22] Indeed, the Tax Court with the notable exception of the case at bar, follows the Circuits. See, Gestrich v. Comm'r, 74 T.C. 526, 529 (1926); Kluckhohn v. Comm'r, 18 T.C. 892, 894-95 (1952): "It does not appear that he profited from his use of the material but that is not important."; see also, B. E. Adams v. C.I.R., 25 T.C. Memo 123 (CCH) 1966-242; S.D. Grazia v. C.I.R., 21 T.C. Memo 1572 (CCH) 1962-296; C. Vandebilt v. C.I.R., 16 T.C. Memo 1081 (CCH) 1957-235; G. M. Smith v. C.I.R., 26 T.C. Memo 1281 (CCH) 1967-246; A.T. James v. C.I.R., 23 T.C. Memo (CCH) 1964-49; B.D. Steinman v. C.I.R., 30 T.C. Memo 1263 (CCH) 1971-295.

[23]At the oral argument, Judge Pierce evinced this error:

"JUDGE PIERCE: Is there any evidence in

It is of the utmost importance for this Court to decide: a) does the regulation require a profit for a writer if otherwise his or her

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the record in the tax court that demonstrates that in any of those five years, there was a profit earned by you?
"MR. KLAPPER: To the contrary, it was my clear statement from the beginning.
"JUDGE PIERCE: So the simple fact of the matter is, that there was no profit earned for five successive years in connection with your writing?
"MR. KLAPPER:....[T]hat is correct.

"JUDGE PIERCE: All right.

"MR. KLAPPER: Not that they had to force it out of me, I never denied - -* * *

"JUDGE PIERCE: I wanted your answer, I got your answer. I understand.

"MR. KLAPPER: No profit, no profit. all of my expenses were geared to not the hobby aspect, but the start up of the business aspect, and I proved it to them....

"JUDGE PIERCE: Mr. Klapper, I understand from Section 183 that there are nine factors...for the purpose of earning a profit. I must say, I don't hear you addressing any of those nine issues....

"MR. KLAPPER: I am planning to address the issue whether it was business or a hobby....yes, the case law...." (Transcript of Official tape of oral argument before second Circuit, May 21, 1991, pp. 9-12).

effort is serious within the meaning of a start up business; b) if so does the regulation defacto overrule the unanimous Circuit decisions previously cited[24]; c) should this Court in a matter of first impression review the regulation both as to its import, and assuming it does require profit etc, for the serious starting writer, require being overruled and the Circuit decisions, e.g., Snyder affirmed.

II

The Failure of the Second Circuit to apply Helvering and strike the deficiency notices as arbitrary and capricious, conflicts with this Court's law and is upon the facts so far a departure from the accepted and usual course, as to call for exercise of this Court's power of supervision

The Tax Court committed reversible error in failing to grant petitioner's motion to set aside all the Notices of deficiency as

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[24] Indeed, the Second Circuit appears here to be in conflict with itself as well, see Brooke v. C.I.R., 799 F.2d 833, 838 (1986).

arbitrary and capricious (140, 4-5, 32-139); and, the failure of the Second Circuit to decide the issue, (aa 1-5), raises serious matters as above captioned under Helvering v. Taylor, 293 U.S. 507 (1935):

> "The purpose of that provision [Revenue Code section] is to define the jurisdiction granted to the board; it does not define any rule of evidence or burden of proof. Plainly it does not support the Commission's contention that the taxpayer, even though he has shown the determination to be arbitrary and excessive, must necessarily pay the added tax because he has not also shown that he owes nothing; or the correct amount, if any, that legally may be laid upon him." (at 513; emphasis supplied).

> "But there is nothing in it [Tax Board rules] to suggest intention to require the taxpayer to prove not only that a deficiency assessment laid upon him was arbitrary and wrong, but also to show the correct amount....The fact that the Commissioner's determination was arbitrarily made may reasonably be deemed sufficient for the board to set it aside." (at 513-14; emphasis supplied).

The record is clear that respondent after repeated due process violation of its own agreement to proceed by way of an interim appeal on the legal issue of hobby/ business

start up where there is no profit, issued the Notices for the tax years without any facts,[25] a crucial point conceded by IRS through its trial counsel:

> "[W]hen a taxpayer refuses from the audit level through the level of District Counsel, and I'm talking about the years subsequent to 1979, to show up for scheduled appointments, or to submit documentation, and throughout every work paper of every auditor, it so states, the taxpayer has refused to submit documentation and has refused to verify claimed deductions...." (182-83).[26]

The Second Circuit opinion thus tolerated

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[25]Although IRS had by then through Ms. Goldberg completely audited petitioner for 79 and the subsequent years in question as to both writing effort and related expenses, (33-37, 71-77).

[26]Indeed, in its answer in the Tax Court regarding all of the abuses of IRS that led to the arbitrary and capricious notices, contrary to T.C.R. 36(b), IRS denied generally these charges, while the rule requires that the answer of IRS be:

> "drawn ... advise petitioner and the Court fully of the nature of the defense ....contain...specific admission or denial of each material allegation in the petition."

lawlessness on the part of IRS before trial.[27] As acutely aware as is the judiciary of the need for a strong tax law enforcement, equally is its wrath when IRS acts arbitrarily and capriciously in a manner as the present case, see, Clark v. Comm'r, 266 F.2d 706 (4th Cir. 1961); Vanguard v. Comm'r, 418 F.2d 829 (2d Cir. 1969); Wilson Land Co. v. Comm'r, 87 F.2d 185 (4th Cir.1937); Welch v. Comm'r, 297 F.2d 305 (4th Cir. 1961).[28]

III

The Failure of the Tax Court to Abide By any Semblance of Procedure and the failure of the Second Circuit to reverse under its "plenary" and "clearly erroneous" standards conflicts

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[27]Petitioner is not arguing that IRS had a duty to grant an interim administrative appeal, but that the failure to so do in the way it was done gave rise to constitutional abuse because once IRS so decided to proceed following the '79 audit by Ms. Goldberg, it had to avoid substantial prejudice. This it did not do, American Farm Lines v. Black Ball Freight Service, 397 U.S. 523, 539 (1971).

[28] Indeed, in its one rare moment of candor, IRS's attorneys admitted the serious abuses leading to the Notices: "You [petitioner] have serious causes of action against the government [IRS]." (41).

with this Court's law and is under the facts so far a departure from the accepted and usual course, as to call for exercise of this Court's power of supervision

Petitioner is not arguing that since the Second Circuit erred, thus compounding the Tax Court's errors, this Court should sit as a court of review qua review. Rather, that the abuses were egregious to such a geometric degree as to establish the certiorari standard set forth in the headnote. Thus:

T.C.R. 91. **STIPULATIONS FOR TRIAL**, provides:

> "**(a) Stipulations Required:**...The parties are required to stipulate, to the fullest extent to which complete...agreement can or fairly should be reached, all matters...which are relevant regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters to be stipulated are all facts, all documents and papers or contents or aspects thereof....The requirement of stipulation applies under this Rule without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation.
>
> * * *
>
> **(e) Binding Effect:** A stipulation shall be treated...as a conclusive admission by the parties to the

stipulation....The Court will not permit a party to a stipulation to qualify, change or contradict a stipulation in whole or part....A stipulation and the admissions therein shall be binding...." (Emphasis supplied).[29]

The fact portion supra makes clear how unconscionably in error the Tax Court was on the law regarding stipulations. The Second Circuit opinion ignores its duty to apply this law, a most clear violation of its plenary

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[29]The Tax Court's own pre-trial order states:

"Policies

"You are expected to begin discussions...for purposes of...preparation of a stipulation ....[T]he Court expects the parties to negotiate in good faith with this objective in mind.

* * *

Requirements

To effectuate the foregoing policies and an orderly and efficient disposition of all cases on the trial calendar, it is hereby

ORDERED...all documentary and written evidence shall be marked and stipulated....If a complete stipulation...is nor ready for submission at trial, and if the Court determines that this is the result of either's party's failure to fully cooperate in the preparation thereof, the Court may order sanctions against the uncooperative party....." (aa 15).

role. See, Commissioner v. C.I.R., 484 U.S. 3, 6 (1987), holding review of the Tax Court under 26. U.S.C. §7482(a), is as of the district court in civil actions tried without jury: "[T]he duty of the Court of Appeals is to consider whether the Tax Court committed error".

Given the facts regarding the stipulation issue, the decision is a misapplication of its own articulated "clearly erroneous" standard, Webster Investor Inc. v. C.I.R., 291 F.2d 192, 197 (2d Cir. 1961):

> "The law is clear that this Court must allow the findings of fact of the Tax Court to stand unless it is clearly erroneous and the reviewing court is 'left with the definite and firm conviction that a mistake has been committed.' *United States v. Gypsum Co.*, 333 U.S. 364...*Commissioner v. Dilstein*...363 U.S. 228...." . (Emphasis supplied).

Accd, Stemkowski v. C.I.R., 690 F.2d 40 (2d Cir. 1982).

By violating both the plenary and clearly erroneous standards, a serious crisis of due process is posed. Why? Because, since every

petitioner to the Tax Court knows, (or is so held to know), of his obligation to bargain in good faith toward stipulating, an unscrupulous IRS - appellee below - will with complete impunity use the one sided pressure to keep the taxpayer tied up in audits before trial; then, as below, spring a trap, claiming "our Ms. Hannah Klapper never agreed, See Klapper v Comm'r."

This is why the Circuits are adamant is applying the stipulation rule, Hillman v. Comm'r, 687 F.2d 164 (2d Cir. 1982); Larsen v. C.I.R., 765 F.2d 939 (9th Cir. 1985); Miller v. C.I.R., 654 F.2d 519 (8th Cir. 1981).

Next: the Tax Court in violation of both the plenary and clearly erroneous standards, failed to grant summary judgment to petitioner under T.C. R. 121, (220). This error was compounded by the Second Circuit not even addressing the issue although clearly raised on appeal.

IRS produced no documents or witnesses at the hearing set down for exactly such proof to

refute the fact that it had no case against petitioner, (151-222), following petitioner's motion, (32-139), setting forth the facts, entitling petitioner to summary judgment.

Next, same motion and hearing: the Tax Court should have granted petitioner's motion to dismiss under T.C.R. 53, both because of IRS's failure of proof, and because as above stated, they violated the Tax Court rule requiring specific denials, not general denials, (a failure compounded by IRS counsel saying they could not find their own witnesses and did not even know whether they still worked for IRS).[30] The Second Circuit remained silent in its opinion, (aa 1-5).

Next, same hearing and motion: the Tax Court should have granted petitioner's motion under T.C.R. 50(c), 70(a)(2) and 121, requiring IRS

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[30]A critical issue since the missing witnesses were either the culprits that had threatened petitioner or the auditor that had asked for IRS that an interim appeal on the hobby issue be undertaken.

produce its records; records that would have proved even stronger both the due processes abuses and that the Notices were arbitrary and capricious. Again, the Second Circuit ignored the issue, (aa 1-5).

Finally, and as important as the violation of the stipulation rule, the final opinion of the Tax Court, (620-26, aa 6-13), shows under any fair reading that F.R.C.P. 52(a) requiring of the Tax Court to find the facts specially and state separately its conclusions of law, was not done, or done incompletely, and/or prejudicially, often times reading as a complete fiction to one who knows the record.

By ignoring this considerable error, (aa 1-5), the Second Circuit conflicted with the decisions of the Circuits H. Prang Trucking Co v. Local Union, 613 F.2d 1235, 1238 (3d Cir. 1980). Accd, Roberts v. Metropolitan Life Insurance Co., 808 F.2d 1387, 1390 (10th Cir. 1987); Foulks v. Ohio Dept of Corrections, 713 F.2d 1229, 1237 (6th Cir. 1983). See in further

support, Colorado Flying Academy, Inc. v. United States, 724 F.2d 871, 877-78 (10th Cir. 1984). Indeed, it conflicted with the law of the Second Circuit, Barnes Group Inc. v. U.S., 872 F.2d 528, 531-32 (2d Cir. 1989).[31] [32]

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[31]A result most serious, for by so ignoring, it allowed the Tax Court opinion - a sweeping of the true record under the rug - to remain unchallenged in its due process violations.

[32]Finally, Tax Court evidence errors supra, are also part of the Tax Court's abuses. See, Kelly v. Everglades Drainage District, 319 U.S. 415 (1943) Colorado Flying Academy, Inc. v. United States, 724 F.2d 871, 877-78 (10th Cir. 1984); Barnes Group Inc. v. U.S., 872 F.2d 528, 531-32 (2d Cir. 1989). See also, 14 Mertens, Law of Federal Income Taxation, (Callaghan 1988) at § 50.94, p. 288-89: (Tax Court trials are in accordance with the rules applicable to District Court trials without jury):

> "The rules governing the admissability of evidence for the Tax Court are 'rules of common sense and fair play', and are the same as those applied to civil procedure in the District Courts, except that the statutes and Regulations should be construed liberally in favor of the taxpayer." (emphasis supplied.)

Accd, Kalgaard v. C.I.R., 764 F.2d 1322, 1323 (9th Cir. 1985), (the Circuit Courts will review the "Tax Court's decision to exclude evidence...for any abuse of discretion...."); Clarente v. C.I.R., 649 F.2d 152 (2d Cir. 1981); Estate of J.G. O'Connell v. C.I.R., 640

IV

The extreme Constitutional Abuse of the Tax Court arising from intentional bias, all ignored by the Second Circuit, warrants certiorari review

The facts set forth throughout this petition establish the abuse and the bias of the Tax Court judge. The seriousness is reflected in the Tax Court decision. It held:

> "Moreover, petitioner has not proved that any of his alleged writing/photography or law activities were engaged in for profit.....Petitioner has the burden of proving....", (623, aa 9).
>
> * * *
>
> "Petitioner did not prove...he maintained adequate books and records, that he made significant changes in his operating methods, that he sought expert advice, that he spent substantial time and effort on his activities....", (624, aa 10).

In view of the record uncontestable proof

F.2d 249, 251 (9th Cir. 1980), ("The applicable case law directs the trial court to consider all relevant information...."; Curtis v. C.I.R., 623 F.2d 1047 (5th Cir. 1980); Valley Title Co. v. C.I.R., 559 F.2d 1139 (9th Cir. 1977);

Thus, said failure regarding use (and exclusion) of evidence requires reversal of the Tax Court, Estate of Neugass v. C.I.R., 555 F.2d 322 (2d Cir. 1977).

that petitional proved every one of these categories despite the Tax Court judge's attempts to stop petitioner from his due process day in court, (see this petition inter alia), indicates why this case should be a certiorari granted vehicle for discouraging exactly what is involved here: an opinion that believes it will not be held accountable because the path to accountability is too difficult to overcome.

Sadly, the Second Circuit, merely echoed the Tax Court's outrageous due process abuses as if petitioner had not made any proof off the 600 plus record and his over 70 pages of briefing (aa 1-5).[33] [34] The fact is: Judge Well's opinion,

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[33]For example, both opinions claimed petitioner delayed the process, (aa 5; 13). He did not and the record is totally clear without contradiction on this.

Thus, petitioner was first noticed for 79 audit, March, 1982. Except for two short adjournments at the beginning, (to get ready and a court conflict for petitioner's legal activities), every adjournment of the audit was from IRS. They stretched over years. Petitioner agreed to all and was otherwise most solicitous of IRS's schedule (33, 64-69, 91-124).

[34] Judge Wells in his opinion repeated the falsehood that petitioner presented dishevelled documents. In fact as above established, (378-412), Judge Wells with biased intent kept out the well organized documents, then in obvious contravention of T.C.R. 143(d)(2), refused to return them to petitioner; still another device to stymie petitioner from proving their organization, (454).

Equally outrageous is Judge Well's claim he gave petitioner time to photocopy the hundreds of pages of documents petitioner was able to cull from the thousands he had, (aa 9).

In fact, Judge Wells did everything he could to stop petitioner from both introducing documents and xeroxing them. Xerox corporation couldn't have done the photocopying job under the pressures he imposed, (379, 381, 383- 4, 390-91, 392, 393, 394, 395, 396-412).

Thus:

"THE COURT" Do you have copies for Respondent, Mr. Klapper?"

"THE WITNESS: The answer is, Your Honor, as of this morning at 8:00, all these documents have been reviewed and were accepted. How in the world would I have copies of thousands of pages of documents." (381).

And:

"THE COURT: Do you have a copy for Respondent?"

"THE WITNESS: Your Honor, you asked me that before. I produced hundreds of documents ...."

"THE COURT: That's not the question. I said; do you have a copy for Respondent?"

"THE WITNESS: In view of the history, I couldn't have." (390).

And:

"THE COURT: Do you wish a recess while you copy your documents, Mr. Klapper?"

"THE WITNESS: How -- do you think I could copy thousands of documents during --"
"THE COURT: I'm asking you -- do not ask me a question in response to my question."

"THE WITNESS: It's physically impossible if I had 24 hours."

"THE COURT: If I give you more than 24 hours?"

"THE WITNESS: No. You said this trial is ending at 3:00, and I'm accepting that with my objection."

***

"THE COURT: Either you take a recess and copy your documents and the Court will continue until your done copying, or the documents will not be allowed to be admitted into this trial."

"THE WITNESS: I couldn't finish copying these if I had copied for 24 hours."

"THE COURT: I'll give you 24 hours."

***

"THE COURT: Do you wish a recess to copy your documents, Mr. Klapper?"

"THE WITNESS: No, I don't. I stand on my objection. (393-95; emphasis supplied).

See also Judge Wells literally halving the trial time in obvious ex parte communication with appellee, while petitioner was in the middle of his case proof, (326-29, 330--31, 394).

Further, regarding J Well's incredible, untrue claim petitioner's documents were disorganized, (aa 8-9):

> "THE COURT: This is the most disorganized I have ever seen in my experience....." "THE WITNESS: May I comment on that, Your Honor?....You couldn't make it more organized I open it up." "THE COURT: I'm calling this to a halt, Mr. Klapper." (399-400; emphasis supplied).

And:

> "THE COURT: [T]hey are disheveled and disorganized...."
>
> ***
>
> "THE WITNESS: But in pulling it out, in the rubber band, how disheveled were they?"
>
> "THE COURT: I'm not going to argue with you anymore, Mr. Klapper." (410; emphasis supplied).

Indeed, as petitioner urged over and over before the Second Circuit in record after record citation, how in the world would IRS have spent four days in complete document exchange literally right before trial if the documents were so disorganized as to be not capable of coherence?

And, assuming such a lunatic possibility, if

start to finish, (aa 6-13), is a tarnish upon American jurisprudence. [35]

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that was the case, instead of arguing pseudo legal arguments of no agreed to stipulations, IRS attorney at the opening of trial would instantly have said they did not stipulate because it was a physical impossibility!

Finally, as the record shows, when it suited IRS's purpose, they without any difficulty from disorganization, etc, did stipulate to hundred of documents in many categories that were the same documents also used at trial as to which Judge wells and IRS attorneys chorused were disorganized!

And, the stipulation petitioner drafted was detailed to the ultimate degree - again impossible if the documents were disheveled - and included the final figures of IRS's own auditor, Faulkner; figures that could never have been added up and confirmed in his own handwriting, if the documents were disorganized, (249-52,480-84).

[35]Including his citation to legal authority. Consider Dreicer v. Commissioner, 78 T.C. 642 (1982), aff'd without opinion, 702 F.2d 1205 (D.C. Cir. 1983), (IRS B 10-11): T.C. Memo 1979-395 (39 T C M 233), (aa 10).

There the taxpayer over two decades, nine months a year, searched the world for the "Perfect Steak", to write a book so named. The Tax Court found no publications or attempts; rather exorbitant and lavish spending "to be envied by those who do not have the independent income to sustain", (T C M at 240).

The contrast of Dreicer to the repeated efforts of petitioner to get published and his spartan life style in pursuit of same (including his two week trips to France), cannot

Perhaps, therefore, this point, more than any other, is the critical one for certiorari. For, it is axiomatic that the Tax Court must give a fair trial, Arcadia v. Shaughnessy, 347 U.S. 260 (1954) (cited with approval Saltzman, IRS Practice and Procedure, ¶ 1.00 (W,G.L. 1981) (supp. cum No. 2, ¶ 1.03[2][c]); Cox v. Louisiana, 379 U.S. 559 (1964); Railey v. Ohio, 360 U.S. 423-437-38 (1958).

Certiorari should be granted to emphasize this truth: in this type Tax Court matter, due process is to society's benefit. That is because overall, a fair IRS and Tax Court process collects taxes when it should and the tax payer prevails when he or she should. The importance of this in today's American society, especially economic/tax, cannot be overemphasized. To review this case is to confirm, affirm, and advance the standards -

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be overestimated.

Thus legally - as in every fact and fact inference way - Judge Well's opinion is tarnished.

standards alone - which make the promise of America unique.

The commentators agree: Nowak, Rotunda & Young, Constitutional Law 1, 487-88 (West Third ed. 1986) states why:

> "The essential guarantee of the due process clause is that of fairness. The procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property.
>
> "The Court has continually held that a 'fair trial in a fair tribunal is a basic requirement of due process.' [citing In re Murchison, 349 U.S. 133, 136 (1965)] This requirement applies to...judges.
>
> "The Supreme Court has strictly enforced this right ....The rule against biased decision-makers also serves to disqualify a judge in cases where the bias was solely the result of abuse or criticism from the parties appearing before him. [citing Taylor v. Hayes, 418 U.S. 488, 501-503 (1974; Mayberry v. Penn, 400 U.S. 455 (1971); Pickering v. Board of Education, 391 U.S. 563. 568-69, n.2 (1968).]"

Tribe, American Constitutional Law, 1, 683-84 (Found Press, 2 ed. 1988):

> "[C]ertain procedures were consistently thought to be required either by some 'high law' or as a matter of

'fundamental fairness'. In all cases, the core content of procedural due process placed upon government the duty to give notice and an opportunity to be heard to individuals or groups whose interest in life, liberty or property were adversely affected by government action. The assurance of a fair trial or at least a fair hearing mandated the individual be accorded an open hearing before a 'neutral and detached magistrate'...."

And:

"The Supreme Court has traditionally placed enormous weight on the *neutrality* of due process hearings. In this area, indeed, the Court's approach to due process has tended to stress its *intrinsic* aspects almost as much as its *instrumental* aspects, focusing on the 'moral authority' of the law as well as the accuracy of its application. Thus 'the right to an impartial decision-maker is required by due process' in every case. And since 'the appearance of evenhanded justice...is at the core of due process,' the Court may disqualify even decision-makers who in fact 'have no actual bias' if they might reasonably *appear* to be biased." (id at 744-45).

And:

"Nor may a judge or other ostensibly impartial decision-maker 'give vent to personal spleen or respond to a personal

grievance' in reaching a decision."[36] (id at 746).

No clearer recognition of this can be found than in the very opinion of Judge Wells, where he acknowledges Suarez v. Comm'r, 58 T.C. 792 (1972), (625, aa 12, n2), (cited to Judge Wells at on petitioner's motion before him, (51).

Suarez was quoted:

> "Moreover, we cannot ignore the additional factor that the integrity of the judicial process is also at stake.
>
> "We conclude that any competing consideration based upon the need for effective enforcement of civil tax liabilities...must give way to the higher goal of protection of the individual and the necessity for preserving confidence in, rather than encouraging contempt for the processes of Government" (at 805).

Suarez, then struck IRS's answer on procedure, evidence and due process grounds, (at 815). Judge Well's citation to Suarez is

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[36] Citing n.6, Offutt v United States, 348 U.S. 11, 14 (1954); Mayberry v Pennsylvania, 400 U.S. 455 (1971), where the court was disqualified from handing down contempt citations because the accused had vilified the judge without excuse. Cf, the present case.

res gestae of his wrongdoing. There is no other relevant reason for him to refer to it.

The Second Circuit's claim that petitioner sought only "to create disruption and delay", (aa 5), is without record support and the Second Circuit offers no proof. The record entirely stand for petitioner.

Indeed, on the very issue of delay related abuse, the Second Circuit as the Tax Court ignored the binding law of estoppel that should have been applied against IRS at the Tax Court level. See, Hansen v. Harris, 619 F.2d 942 (2d Cir. 1980); United States v. Lazy F C Ranch, 481 F.2d 985 (9th Cir. 1973); Tonkonogy v. United States, 417 F. Supp. 78 (S.D.N.Y. 1976); Southern Hardwood Traffic Assoc. v. United States, 283 F.Supp. 1013 (W.D. Tenn. 1968); Interstate Fire Insurance Co. v. United States, 215 F. Supp. 586 (E.D. Tenn. 1963); Smale & Robinson v. United States, 123 F. Supp. 457 (S.D. Cal. 1954).

Smale is remarkably analogous, (see facts at

60-68); the Court's characterizing the administrative representations of IRS, (at 462); the finding off the course of administrative dealing by IRS, "waiver", (at 462).

Then, critically, Smale, made the case in legal/constitutional terms for estoppel against IRS, (at 463-65). Equally critical, Smale, made the case for estoppel off the very facts proved to have transpired administratively, (at 467). Smale is a blueprint in fact and law for the present case. As the tax Court disallows IRS's defenses there, so should this Court reverse the refusal to dismiss, etc., by the lower Court, respondent's answer. Accd, Tonkonogy, supra at 79-80), also highly analogous to the case at bar.

Finally, Judge Well's granting sanctions against petitioner, (aa 13), again affirmed by the Second Circuit without any proof, (there is none), (aa 4-5), defies constitutional belief. Judge Wells granted IRS's sanctions motion

against petitioner - $5,000 - the highest amount allowable, Garbis, Junghans, & Struntz, Federal Tax Litigation, W.G.L.¶¶ 1,01, 3.04[5], 12.07 (1985) (citing to IRC § 6673). Once again, the decision in the Tax Court and the affirmance by the Second Circuit is contrary to all law, May v. C.I.R., 752 F.2d 1301 (8th Cir. 1985); Steinbrecker v. C.I.R., 712 F.2d 195 (5th Cir. 1983). cf: Larsen v. C.I.R., 765 F.2d 939 (9th Cir. 1985). [37]

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

HAROLD KLAPPER, ESQ.

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New York, N.Y. 10003
(212) 982-8627

Counsel of Record (Pro Se)

July 31, 1991

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[37]Appellant sought a writ of mandamus against J Wells before the Second Circuit, Docket No. 88-3065. It was denied, December 12, 1988, without opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-second day of May, one thousand nine hundred and ninety-one.

FILED MAY 22, 1991

Present:
HONORABLE THOMAS J. MESKILL,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE JOSEPH M. McLAUGHLIN,

Circuit Judges.

HAROLD KLAPPER,

Petitioner-Appellant,

v. Docket No. 91-4020

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

This is an appeal from a decision of the United States Tax Court, Wells, J., entered on November 15, 1990, finding deficiencies totalling $29,828 in Klapper's tax returns for the tax years 1979, 1981, 1982, 1983, and 1985. The tax court having found Klapper's legal arguments to have been frivolous and groundless also imposed a penalty of $5,000 pursuant to 26

U.S.C. § 6673.

This cause came on to be heard on the transcript of record from said tax court and was argued by counsel.

The decision of the tax court is AFFIRMED.

Klapper advances a multifaceted attack on the decision of the tax court. he claims among other things that the tax court committed error in disallowing his itemized deductions for expenses purportedly incurred in pursuit of his writing activities, the Commissioner engaged in conduct that mounted to a constitutional abuse, Judge Wells violated his due process rights, and Judge Wells committed error in not recusing himself. We find no merit in any of Klapper's arguments.

A taxpayer seeking the benefit of a deduction bears the burden of proving that he is entitled to claim the deduction. Gatlin v. CIR, 754 F.2d 921, 923 (11th Cir. 1985). The notice of deficiency which is sent to the taxpayer by the Commissioner carries a presumption of correctness. It is the taxpayer's responsibility to prove the deficiency to be incorrect. Schaeffer

v. CIR, 779 F.2d 849, 857 (2d Cir. 1985). A tax court determination that the "taxpayer has failed to produce sufficient evidence to support a deduction is one of fact subject to reversal only if clearly erroneous." Zmuda v. CIR, 731 F.2d 1417, 1421 (9th Cir. 1984).

Section 183 of the Internal revenue Code provides that in general no deduction for expenses "shall be allowed" if an activity is "not engaged in for profit." 26 U.S.C. ^S 183(a). To merit a deduction, a taxpayer must establish that he engaged in the activity at issue with the intention of realizing a profit. Here, the tax court found that Klapper had not engaged in his writing and photography activities with an "actual and honest profit objective." The tax court found inter alia that Klapper did not conduct his activities in a businesslike manner, that his books and records were not adequately maintained, that he failed to seek expert advice, that his activities had not produced any profits, and that he derived personal pleasure from the activities.

Additionally, the tax court adjudged Klapper not to be a credible witness.

We have reviewed the transcript of the proceedings in this case as well as the entire record and conclude that the tax court's findings are not clearly erroneous. Treasury regulation 1.183-2(b) sets forth the factors that are to be considered when evaluating whether a particular activity has been engaged in for profit. See 26 C.F.R. § 1,183-2(b). these are the very factors that the tax court relied on when making its determination. We agree with tax court that Klapper failed to carry his burden of proof by establishing that his activities satisfied these criteria.

Furthermore, we affirm—the tax court's decision to impose the $5,000 penalty. The decision of the tax court to impose a penalty pursuant to 26 U.S.C. § 6673 is reviewed under an abuse of discretion standard. Grimes v. CIR, 806 F.2d 1451, 1454 (9th Cir. 1986). The position that Klapper took before the tax court was completely unsupported by any record

evidence. The record plainly demonstrates that Klapper's primary objective during the proceedings was to create disruption and delay.

Klapper's behavior before the tax court was unjustified and completely unprofessional. Judge Wells demonstrated great patience and restraint in dealing with Klapper and afforded him ample opportunity to present his case. Instead of taking advantage of this opportunity Klapper set out to obfuscate the true issue - - the factual and legal basis for his deductions. Thus, the imposition of the penalty was not an abuse of discretion.

Accordingly, we affirm the decision of the tax court in all respects.

s/
Thomas J. Meskill, U.S.C.J.

s/
Lawrence W. Pierce, U.S.C.J.

s/
Joseph M. McLaughlin, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

T.C. Memo 1990-372

UNITED STATES TAX COURT

HAROLD KLAPPER, Petitioner
COMMISSIONER OF INTERNAL REVENUE, respondent

Docket No. 36115-87 Filed July 23, 1990

Harold Klapper, pro se.

Hannah Klapper, for the respondent.

MEMORANDUM OPINION

WELLS, Judge. Respondent determined deficiencies in and additions to petitioner's Federal income taxes as follows:

Taxable Year	Deficiency	Addition to Under Section 6651(a)
1979	$ 6,307.00	$ - 0 -
1981	11,987.00	784.40
1982	12,013.00	268.90
1983	14,264.00	- 0 -
1985	8,547.00	- 0 -

After concessions, we must decide the following issues: (1) whether petitioner's writing/photography and law activities during the taxable years in issue were engaged in for profit; (2) whether petitioner had substantiated deductions attributed to those activities and charitable contributions; and (3) whether the instant proceedings have been maintained by

petitioner primarily for delay, or whether petitioner's position has been frivolous or groundless within the meaning of section 6673(a) of the Internal Revenue Code.[1]

For convenience, we will combine our findings of fact and opinion.

The parties each refused to sign the other's proposed stipulation of facts. Consequently, none of the facts were stipulated for trial. In his opening brief, petitioner did not propose findings of fact, and in his reply brief, petitioner made no objections to respondent's proposed findings of fact, as required by Rule 151(e)(3). Petitioner made only the following statement with regard to proposed findings of fact:

Petitioner's legal arguments on brief are similarly vague and incoherent. Petitioner's sole argument on brief is that "under binding

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[1]Unless otherwise indicated, all section references are to the Internal Revenue Code as amended and in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

authority, petitioner in law, fact and equity, and constitutional mandate is right." We find petitioner's statement to be frivolous and not in compliance with Rule 151(e)(5), which requires parties to set forth and discuss the points of law involved and disputed questions of fact. Petitioner is an attorney and should therefore know that his brief is insufficient. Although we may treat arguments not briefed as conceded (Rule 151(e); Remuzzi v. Commissioner, T.C. Memo. (1988-8), we nevertheless will address the issues set out above. Petitioner bears the burden of proof with respect to all issues in the instant case. Rule 142(a).

Petitioner resides in New York, New York, at the time he filed his petition. Petitioner is an attorney and a member of the New York bar.

At trial, petitioner offered as evidence, for the purpose of substantiating his Schedule C expenses, plastic grocery shopping bags filled with disheveled, disorganized, and incomplete statements and receipts. The Court stated that it would not admit the documents in such

condition and that it would admit the documents only if copies were made and the documents offered into evidence in an organized manner. The Court offered petitioner time to copy and organize the documents, but petitioner declined the Court's offer. Thereupon, the Court ruled that the documents would not be admitted.

To prove Schedule C expenses, petitioner also offered the same bank statement that he had offered to prove interest expenses that had been the subject of a stipulated settlement by the parties. The record contains no records, receipts, or written statements to substantiate the amounts of alleged travel expenditures, the time of alleged travel, or the business purpose of alleged travel, during the years in issue. sec. 274(d). In the deductions in issue beyond those alleged by respondent.

Moreover, petitioner has not proved that any alleged writing/photography or law activities were engaged in for profit as required by section 183. Petitioner has the burden of proving that he engaged in his alleged

activities with the requisite profit objective. Rule 142(a); Dunn v. Commissioner, 70 T.C. 715, 720, affd. 615 F.2d 578 (2d Cir. 1980). Based upon the record as a whole, we find petitioner has failed to prove that those alleged activities were conducted with an actual and honest profit objective. Levy v. Commissioner, 91 T.C. 838, 871 (1988); Elliot v. Commissioner, 90 T.C. 960 (1988), affd. 899 F.2d 18 (9th Cir. 1990); Dreicer v. Commissioner, 78 T.C. 642 (1982), affd. without opinion 702 F.2d 1205 (D.C. 1983). Petitioner did not prove that he carried on his activities in a businesslike manner, that he maintained adequate books and records, that he made significant changes in his operating methods, that he sought expert advice, that he spent substantial time and effort on his activities, that he had a history of profit from his activities, and that he did not derive significant pleasure from his activities. Sec. 1.183-2(b), Income Tax regs. After observing petitioner's demeanor on the witness stand, we find that petitioner is not a credible witness.

Throughout the trial, and before and after the trial, petitioner attempted to mischaracterize statements of the Court and of respondent's counsel. Petitional appeared hostile and belligerent. During the trial, the Court admonished petitioner for his attempts to impugn the Court and warned him that the Court would hold him in contempt if he continued such conduct.

The only argument made by petitioner in these proceedings is that he is the victim of unconstitutional discrimination. petitioner mad that argument in a motion for summary judgment denied by the Court prior to trial. As a general rule, we do not look behind a deficiency notice to examine the evidence used or the propriety of respondent's motives or of the administrative policy or procedure involved in making the determinations. Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 327 (1974). An exception to the foregoing rule is made when taxpayer produces "substantial evidence of unconstitutional conduct by respondent in

determining the deficiency***." [Citations omitted]. Berkery v. Commissioner, 91 T.C. 179, 186 (1988), affd. 872 F.2d 411 (3d Cir. 1989); Suarez v. Commissioner, 58 T.C. 792, 814 (1972), overruled in part Guzzetta v. Commissioner, 78 T.C. 173, 184 (1982).[2] Nonetheless, in the instant case, petitioner failed to produce "substantial evidence of unconstitutional conduct" by respondent. Moreover, how a taxpayer is treated by the Commissioner in relation to other taxpayers is generally irrelevant to deciding a case before us. Penn-Field Industries, Inc. v. Commissioner, 74 T.C. 1014, 1022 (1976). Therefore, petitioner's vague claims of unconstitutional conduct do not affect

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[2]In Suarez v. Commissioner, 58 T.C. 792, 814 (1972), overruled in part Guzzetta v. Commissioner, 78 T.C. 173, 184 (1982), we held that violation of the Fourth Amendment right to be free from unreasonable searches and seizures required that the burden of going forward with the be shifted to respondent. the portion of Suarez excluding the evidence obtained in violation of the Fourth Amendment has been overruled because of the exclusionary rule. The portion of the opinion shifting the burden of going forward with evidence, however, appears to remain good law.

the resolution of the instant case.

Respondent has moved, pursuant to section 6673, for an award of damages (penalty) in the instant case. We believe that such an award is appropriate. As noted above, petitioner's statements and actions throughout the instant proceedings have been frivolous and groundless and have amounted to a waste of the Court's time and that of respondent. Rather than pursuing the issues before us in the instant proceedings, petitioner pursued issues concerning the conduct of respondent, as noted above, which allegedly occurred during the audit of petitioner for the years in issue. Accordingly, we will grant respondent's motion for damages and award the United States damages (penalty) in the amount of $5,000.

To reflect the forgoing,

Decision will be entered under Rule 155.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

HAROLD KLAPPER) Docket No.
Petitioner,) 36115-87

V.)

COMMISSIONER OF)
INTERNAL REVENUE)
Respondent.)

ORDER

* * *

ORDERED that petitioner's motion...scheduled for hearing at...10:00 a.m. on december 5, 1988....It is further

ORDERED that the trial of this case is set ...beginning 9:00 a.m., December 16, 1988.....

s/
Thomas B. Wells
Judge

Dated: Washington, D.C.
November 18, 1988

UNITED STATES TAX COURT
WASHINGTON, D.C.

STANDING PRE-TRIAL ORDER

To the parties in the Notice of Trial to which this Order is attached:

Policies

You are expected to begin discussions...for purposes of...preparation of a stipulation ....[T]he Court expects the parties to negotiate in good faith with this objective in mind.

* * *

Requirements

To effectuate the foregoing policies and an orderly and efficient disposition of all cases on the trial calendar, it is hereby

ORDERED...all documentary and written evidence shall be marked and stipulated....If a complete stipulation...is nor ready for submission at trial, and if the Court determines that this is the result of either's party's failure to fully cooperate in the preparation thereof, the Court may order sanctions against the uncooperative party.....

* * *

s/
Thomas B. wells
Judge

Dated: Washington, D.C.
June 22, 1988

§ 1.183-2 Activity not engaged in for profit defined.

(a) In general. For purposes of section 183 and the regulations thereunder, the term "activity not engaged in for profit" means any activity....no deductions are allowable for expenses incurred in connection with activities which are not engaged in for profit.....

(b) Relevant factors. in determining whether an activity is engaged in for profit, all facts and circumstances with respect to the activity are to be taken into account....Among the factors which should be taken into account are the following:

(1) Manner in which the taxpayer carries on the activity.....

(2) The expertise of the taxpayer or his advisors.....

(3) The time and effort expended by the taxpayer in carrying on the activity....

(4) Expectation that assets used in activity

may appreciate in value....

(5) The success of the taxpayer in carrying on other similar or dissimilar activities....

6) The taxpayer's history of income or losses with respect to the activity....

(7) The amount of occasional profits, if any, which are earned....

(8) The financial status of the taxpayer....

(9) Elements of personal pleasure or recreation....